CASE NO. S155094

SUPREME COURT OF THE STATE OF CALIFORNIA

EPISCOPAL CHURCH CASES

PETITIONERS' CONSOLIDATED RESPONSE TO AMICUS CURIAE BRIEFS FILED BY CLIFTON KIRKPATRICK, ET AL., PRESBYTERY OF HANMI, ET AL., AND THE HOLY APOSTOLIC CATHOLIC ASSYRIAN CHURCH OF THE EAST IN SUPPORT OF RESPONDENTS

Court of Appeal, Fourth Appellate District, Division Three
(Appeal Nos. G036096, G036408, G036868)

Orange County Superior Court (J.C.C.P. 4392; 04CC00647)
The Honorable David C. Velasquez, Coordination Trial Judge

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INTRODUCTION

In some 33,000 words of briefing, three sets of Amici rehash most of the arguments proffered by Respondents the Episcopal Church and the Episcopal Diocese of Los Angeles. Certain Presbyterian Church (U.S.A.) leaders (the "Presbyterian Leadership Amici") have filed two overlapping briefs on behalf of themselves and several other supposedly hierarchical churches.[1] There is no indication in either of these briefs that the thousands of members of these denominations or any of their local churches support the leadership's self-aggrandizing arguments or want courts to support denominational claims to their property. To the contrary, the Presbyterian Lay Committee opposes the leadership's assertions in an amicus curiae brief of its own. In addition, The Holy Apostolic Catholic Assyrian Church of the East ("Assyrian Church") filed a third brief supporting the Episcopal Church ("Assyrian Br."). Given the many overlaps, Petitioners file this unified response to all three briefs.

The Presbyterian Leadership Amici focus primarily on arguing that courts are constitutionally compelled to "defer" to a denomination in all church property disputes as a matter of free exercise of religion, an argument that the United States Supreme Court rejected forty years ago. The Assyrian Church's brief covers some of that same ground but focuses

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[1] One brief is filed on behalf of the Stated Clerk of the General Assembly of the Presbyterian denomination and a few of its "synods" and "presbyteries" (the "Clerk Br."), and the other is on behalf of the Presbytery of Hanmi and Synod of Southern California and Hawaii (the "Hanmi Br."). A presbytery and a synod are higher-level organizational units in the Presbyterian Church (U.S.A.) roughly equivalent to an Episcopal diocese and province. There are 11,000 Presbyterian congregations organized into 173 presbyteries (district governing bodies) which, in turn, are organized into 16 synods (regional governing bodies). (http://www.pcusa.org/links; *see Presbyterian Church v. Hull Church*, 393 U.S. 440, 442; *Korean United Presbyterian Church v. Presbytery of the Pac.* (1991) 230 Cal.App.3d 480, 488.)

primarily on the assertion that California voluntary association law dictates ignoring other recognized principles of property ownership. All three amicus briefs supporting Respondents ask for special treatment for "hierarchical" denominations as compared to congregational churches, other forms of religious organizations, and secular actors. All three amicus briefs raise few new arguments, gloss over the serious practical and constitutional flaws inherent in the "principle of government" or deference approach, and ignore the advantages of the established neutral legal principles that support St. James Church's property ownership.

In Section I below, Petitioners debunk Amici's claim that deference to hierarchical religious denominations has produced a "stable legal universe" which has been upset by modern decisions applying religion-neutral legal principles. (*See* Clerk Br. at 4-13.) Section II rebuts the assertion that constitutional principles compel a deference or "principle of government" approach. No free exercise, entanglement, equal protection or establishment principle requires "deference" to denominations so that they may self-servingly resolve property disputes in their favor. To the contrary, those constitutional precepts uniformly favor religion-neutral treatment of all parties and property owners. Section II also rebuts Amici's misreading of the United States Supreme Court's seminal decision of *Jones v. Wolf* as somehow creating a superseding, federal constitutional right for denominations to unilaterally create an "express constitutional trust" over the property of affiliated corporations. (Clerk Br. at 13-18.) Section III establishes why neutral principles of law afford a preferred, superior theoretical framework for deciding church property disputes.

Section IV demonstrates that, contrary to Amici's contentions – especially those of the Assyrian Church – religion-neutral legal principles compel affirmation of St. James Church's property ownership. In particular, the law governing voluntary associations is neither at odds with,

nor displaces, established corporate law or property statutes. Section V shines a light on Amici's end run around state property laws, demonstrating that there is no right of a denomination to unilaterally dictate how a formerly affiliated local church can "use" or "enjoy" its own property. Finally, Section VI addresses the factual and record errors advanced by certain Amici.

Amici have presented no reason, let alone a compelling one, why this Court should not heed the United States Supreme Court's hearty endorsement of the "neutral principles of law" method as the best way for California courts to fairly and equitably adjudicate church property disputes involving the different types of religious organizations that characterize our diverse society today; nor do they present any religion-neutral legal principle that supports the erasure of St. James Church's vested property rights.

ARGUMENT

I. CALIFORNIA'S EARLY CHURCH PROPERTY CASES ARE NEITHER UNIFORM NOR STABLE, BUT RATHER REPRESENT A CONFUSING PATCHWORK OF CONFLICTING IDEAS, SOME OF WHICH ARE NOW UNCONSTITUTIONAL.

Amici paint a picture of an idyllic time from the past in which the "principle of government" rule led to constitutional and uniform results.[2] That picture rewrites history. Although denominations generally prevailed in church property disputes in older cases, the legal landscape was hardly stable. The pre-modern cases do not stand for some uniform rule or analytical method, but rather are halting and haphazard in their approaches. And, under modern U.S. Supreme Court guidance, some of these antiquated cases would not survive today.

Baker v. Ducker (1889) 79 Cal. 365, peremptorily held that a majority of the members of an unincorporated congregation could not divorce it from its original denominational affiliation. (*Id.* at 374.) Ten years later, however, *Wheelock v. First Presbyterian Church of Los Angeles*

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[2] Amici improperly cite the now-depublished decision, *Episcopal Church Cases* (2007) 152 Cal.App.4th 808, *depublished by* 67 Cal.Rptr.3d 170, 169 P.3d 94 (Cal. 2007) as support for statements of positive law. (*See, e.g.*, Clerk Br. at 1 [citing the case for the proposition that "'[p]rinciple of government' has been the rule of law in California since 1889"]; Clerk Br. at 5 [citing for the claim that "until the appellate line of decisions that began in 1979 . . . California religious organizations and practitioners had enjoyed a 'stable legal universe'"]; Clerk Br. at 10; *see id.* at ii [listing Court of Appeal's decision in Table of Authorities as cited authority].) Citation of depublished decisions for any purpose other than "law of the case" or collateral estoppel is not permitted. (Cal. R. Ct. 8.1115.) These references should be disregarded. (*Ramirez v. Moran* (1988) 201 Cal.App.3d 431, 437 n.4.)

(1897) 119 Cal. 477, took a different approach. There, a Presbyterian church experienced an internal schism. (*Id.* at 479.) The denomination divided the congregation into two new churches. *Both groups still acknowledged themselves to be Presbyterian.* "After hearing the respective claims of all parties interested," the denomination apportioned the proceeds from a land sale between the two new congregations. (*Id.* at pp. 479-80.) Rather than deferring, this Court held that "neither the Presbytery nor the commission appointed by it had the power to divide and apportion the money held by the church corporation; [ ] the disposition of those moneys were matters for civil courts, and [ ] *ecclesiastical decrees bearing upon such disposition are not binding upon judicial tribunals.*" (*Id.* at 482 [emphasis added].) This Court, on its own, applied principles of equity to divide the funds between the two new Presbyterian churches according to their numerical followings. (*Id.* at 484.)[3] The independent judicial application of religion-neutral equity principles does not support the "principle of government" rule.

Without a unified legal theory, this Court's early church property decisions tended toward the "departure from doctrine" test later held unconstitutional by the United States Supreme Court. *Horsman v. Allen*

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[3] *Wheelock* followed cases holding that even *seceding* members of religious congregations are equitably entitled to a share of the original congregation's property. (*Id.* at 484, *citing Niccolls v. Rugg* (1868) 47 Ill. 47, 48-50 [ordering sale of the church property with the proceeds to be divided proportionately, based on membership strength, among the "old school" and "new school" (i.e., seceding) groups]; *Ferraria v. Vasconcellos* (1863) 31 Ill. 25, 53 [same; "the majority did not forfeit its rights to the property by withdrawing from, . . . neither did the minority by adhering to, the presbytery. The congregation were [sic], before the separation, the beneficiaries under the deed, and we see no reason why they are not so still. The proceeds of the property ought, therefore, to be divided between them, in the proportion which the seceding and adhering members of that congregation bear to each other in point of numbers."].)

(1900) 129 Cal. 131, 135, held that, when a local body secedes from a denomination, "the sole question, therefore, is as to the identity of the church." *Permanent Committee of Missions v. Pacific Synod* (1909) 157 Cal. 105, decided a church property dispute by first deciding that a merger between two denominations had been validly effected under the two churches' constitutions such that the unified denomination adhered to both previous denomination's beliefs. (*Id.* at 121.) Concluding that the merger had been proper, the Court held that a local church which withdrew from the now unified denomination failed to adhere to the doctrine of the now merged faith.

Presbyterian Church v. Hull Church (1969) 393 U.S. 440, held unconstitutional *Horsman*'s and *Permanent Committee*'s departure-from-doctrine approach. A court may not "determine whether the actions of the general church amount to a fundamental or substantial abandonment of the original tenets and doctrines" because it places civil courts in the position of weighing those doctrines. (*Id.* at 443, 449-50.)

Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church (1952) 39 Cal.2d 121, and *Providence Baptist Church v. Superior Court of San Francisco* (1952) 40 Cal.2d 55, also dispose of Amici's fictional "stable legal environment." In *Rosicrucian,* this Court admitted that it was dealing with "an anomalous arrangement," and decided the dispute not by "deference" to some "government," but by reference to "the basic rights of the parties as shown by custom, usage, and past practices of the parties themselves" – that is, by a classic neutral legal analysis. (*Rosicrucian*, 39 Cal.2d at 134-35.)

In *Providence Baptist*, the Court declined to intervene in a dispute between a church's governing board and its pastor, a dispute which was essentially religious in nature. While the Court noted that the local church in question was "apparently . . . the congregational type in which its affairs

are controlled by the members" (*Providence Baptist*, 40 Cal.2d at 61), nothing in the decision indicates that a local church connected with some larger body is completely at its mercy in property matters, as Amici argue.

Far from representing a "stable legal universe," the pre-*Jones* California decisions are inconsistent and grounded in the unique facts of each case and the law of a different era. In any event, mere antiquity does not guarantee the soundness of a legal doctrine, or preserve it from correction or elimination based on later, better reasoning. If this were so, *Brown v. Board of Education* (1954) 347 U.S. 483, would have never overruled *Plessy v. Ferguson* (1896) 163 U.S. 537. There is no precedential reason to apply a deference approach.

II. NEUTRAL PRINCIPLES PROVIDE THE BETTER CONSTITUTIONAL APPROACH FOR DETERMINING CHURCH PROPERTY DISPUTES.

Amici argue that constitutional principles of free exercise of religion, equal protection, and the avoidance of establishment of and entanglement with religion require a "principle of government" or "hierarchical deference" approach. Nothing could be further from the truth. In fact, Petitioners believe that the "neutral principles" approach is constitutionally mandated. (Petitioners' Opening Brief ("Pet. Op. Br.") at 30-39.) But to the extent the question is open, the "neutral principles" approach provides a far better rule of judicial decision in church property disputes.

A. Neutral Legal Principles Do Not Inhibit the Free Exercise Rights of Hierarchical Denominations, But They Do Protect the Free Exercise Rights of All Religious Entities.

Amici argue that applying neutral principles of law to church property disputes diminishes the hierarchical denominations' free exercise of religion, as they cannot usurp and appropriate to themselves the property of former adherents. Thirty years ago, the United States Supreme Court majority rejected that very argument:

> The dissent also argues that a rule of compulsory deference is necessary in order to protect the free exercise rights 'of those who have formed the association and submitted themselves to its authority.' [Citation.] This argument assumes that the neutral-principles method would somehow frustrate the free-exercise rights of the members of a religious association. Nothing could be further from the truth.

(*Jones v. Wolf*, 443 U.S. at 605-06; *see also Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 448 ["Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property."].) "The general rule that courts will not interfere in religious societies with reference to their ecclesiastical practices stems from the separation of the church and state, but has always been qualified by the rule that civil and property rights would be adjudicated." (*Rosicrucian Fellowship*, 39 Cal.2d at 131 [applying neutral legal principles, there derived from the conduct of the parties].)

Amici argue that their schizophrenic form of property ownership (i.e., local church bears the burdens, denominations take the benefit) is part

of their "tradition."[4] (Hanmi Br. at 26-27.) But "tradition" neither constitutes a free exercise interest nor under *Jones* does it trump neutral state laws governing how property is held. To violate free exercise, the "burden [caused by a generally applicable law must] fall on a religious belief rather than on a philosophy or a way of life." (*Smith v. Fair Employment & Housing Comm.* (1996) 12 Cal.4th 1143, 1166 [requiring a landlord to comply with generally applicable landlord-tenant laws, including non-discrimination laws odious to her religious beliefs, does not violate free exercise guarantees].) Respondents' *religious beliefs* are not in play here; only their choice not to perfect claimed ownership interests in a legally appropriate manner. As this Court has observed, consistent with *Jones*, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (*Catholic Charities of Sacramento, Inc. v. Superior Ct.* (2004) 32 Cal.4th 527, 548 [internal quotations omitted], *citing Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990) 494 U.S. 872, 877-78; *accord Protestant Episcopal Church v. Barker* (1981) 115 Cal.App.3d 599, 620-21 [relevant question is whether the local church has created an "express trust" in the denomination's favor with respect to its property].)

Shifting gears, Amici claim that the "neutral principles" method infringes their "free exercise by coercing changes in religious polity." (Hanmi Br. at 23.) That is not true. As *Jones* pointed out, denominations can order their property rights how they wish provided the method is

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[4] It is ironic that Protestant denominations argue that historical tradition allows an existing denomination to seize the property of a departing dissenting local church. The Protestant denominations came into being by dissenting from and leaving the Roman Catholic Church, taking their property with them.

legally cognizable. Under established California law, denominations could have adopted any of the following neutral methods, none of would have changed a whit of their ecclesiastical polity:

- Titling local church property in the name of the denomination or one if its hierarchical leaders (Evid. Code § 662); this approach is followed by the Roman Catholic Church and the Church of Jesus Christ of Latter-day Saints;
- Requiring the local church, as a condition of affiliation, to amend its articles of incorporation to state an express, irrevocable trust over its real property in favor of the denomination (Prob. Code §§ 15200, 15201);
- Requiring the local church, as a condition of affiliation, to amend its articles of incorporation to issue a majority of the corporation's outstanding voting memberships to the denomination, so the denomination will always have majority control of the local church (Corp. Code § 9310(a));
- Having the local church or other entity holding record title execute an express, written, irrevocable trust in the same manner as secular actors (Prob. Code §§ 15200, 15201);
- Having the local church entity expressly assent, by local board and member votes, to a denominational rule or governing instrument provision providing that local church property is irrevocably held in trust for its benefit (*see California-Nevada Annual Conf. v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 754, 757.)

"The burden involved in taking such steps will be minimal." (*Jones*, 443 U.S. at 606.)

Why have some major denominations not taken these steps? Perhaps it is because they know that many local churches will balk at

surrendering their vested property rights – hence Respondents' attempt to create ownership interests through sleight-of-hand. What Amici are really asking for is a special rule that somehow grandfathers in their obstinate refusal to comply with long-standing California legal principles. No constitutional rule gives religious entities a preferential right to ignore the normal rules of property rights that apply to everyone. (*Employment Div., Dept. of Human Resources of Ore.*, 494 U.S. at 890 [facially neutral law banning use of peyote could be applied even to religious use].)

Amici nonetheless claim that the "principle of government" approach is better at *facilitating* free exercise of religion. (Hanmi Br. at 32-34.) However, they never explain how. Their approach may better support land grabs by denominational leaders, but that is not the same thing as the free exercise of religion. Amici do not and cannot counter that a rule always favoring hierarchical denominations as they propose inhibits the free exercise rights of dissenters and those who wish to go their own way. (*See* Petitioners' Consolidated Reply Brief ("Pet. Rep. Br.") at 19-20.)

The California Constitution goes further than the United States Constitution in proclaiming that government may not *prefer* religion. (Cal. Const., Art I, Sec. 4.) Judicial deference to hierarchical denominations, allowing them to resolve civil disputes in their own favor even when the dispute could be resolved by neutral legal principles, is the essence of "preferring" these denominations over other types of religious groups and local religious corporations. This alone renders the "principle of government's" approach, if not unconstitutional, certainly suspect under California law regardless of *Jones*. By contrast, neutral legal principles protect the free exercise rights of *all* – established denominations and dissenting local churches. (*See* Pet. Rep. Br. at 15-16.)

B. Unlike Deference or "Principle of Government," the "Neutral Principles of Law" Method Requires No Entanglement With Religion.

Amici also argue that somehow, a "neutral principles" approach will result in more, and a "principle of government" or hierarchical deference approach in less, entanglement of civil courts with religious polities, but they cite *no* supporting legal authority. (Hanmi Br. at 29-30.) That is not surprising, as *Jones* rejected this very argument:

> The dissent suggests that a rule of compulsory deference would somehow involve less entanglement of civil courts in matters of religious doctrine, practice, and administration. Under its approach, however, civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. [And] in others, the locus of control would be ambiguous . . . . In such cases, the suggested rule would appear to require 'a searching and therefore impermissible inquiry into church polity.' [Citation.] The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.

(*Jones*, 443 U.S. at 605.)

To the contrary, as Petitioners have argued and scholarly commentary has uniformly recognized, using neutral principles of law avoids the danger of entanglement entirely. (Pet. Op. Br. at 35-36; Pet. Rep. Br. at 16-18.) Indeed, under a religion-neutral approach, the extended discussions about the structure of the Episcopal Church in the Court of Appeal's opinion and the Respondents' Answer Briefs are irrelevant. (Pet. Rep. Br. at 16-17.) Amici never confront the fact that the approach they propose requires an intrusive and ultimately subjective and entangling judicial inquiry into the nature of any particular religion's structure.

Amici's citation of a carefully edited quote from *Catholic Charities* on this point is misleading. (Hanmi Br. at 29.) *Catholic Charities* did not hold that denominations get to decide who owns property titled in the names of other entities in order to prevent entanglement. Rather, this Court remarked that in certain church disputes, courts may not substitute their judgment for the denomination in "matters of religious doctrine and internal church governance." (*Catholic Charities*, 32 Cal.4th at 541.) This Court did not indicate that every dispute turns on such "matters," nor that deference would always be necessary. To the contrary, *Catholic Charities* holds that religious entities must abide by neutral civil laws and principles. (*Id.* at 548.) Thus, Amici's statement that "the ways a church governs its property are part of the zone of religious autonomy" begs the question whether the property at issue is "its property," that is, belongs to the denomination or the local church. (Hanmi Br. at 30.) That is a question properly resolved by the civil courts under neutral principles.

C. Equal Protection Principles Do Not Require Special Treatment for Hierarchical Churches.

Citing cases exempting religious organizations from certain anti-discrimination laws, Amici claim that declining to uniquely defer to religious hierarchies somehow singles them out for unequal treatment. (Hanmi Br. at 44-45.) Far from being singled out for *unequal* treatment, Amici's real complaint is that they are subjected to *equal* treatment before the law, that is, to the same rules that apply to any other member of society or to non-hierarchical religions. It is one thing to exempt religions from laws that dictate how they are to act *as a religion* (i.e., whom they might employ as religious functionaries); it is quite another to cede to one subset of religious

entities the exclusive right to unilaterally resolve secular property disputes in their own favor. In Amici's topsy-turvy world, failing to afford hierarchical denominations special deference not afforded any other persons constitutes "hostility to hierarchical organizations." (Hanmi Br. at 23.) No principle of equal protection dictates that special treatment be afforded to one subset – a powerful and well-entrenched subset at that – of religious entities.

Sidestepping their error, Amici argue that religion is a protected class. (Assyrian Br. at 66-67.) No one doubts that religious liberty is a "fundamental right" or that religion can be a "suspect classification." But there is no distinction here between religion and non-religion. Both contestants – the denomination and the now-disaffiliated local church – are religious. The question is whether – as the Episcopal Church and their Amici urge – the law should *prefer* particular religions and religious organizations (established, hierarchical denominations) to others (non-hierarchical religions, breakaway dissenting groups). *That* would deny equal protection. How treating hierarchical religious denominations *the same* as congregational churches and other non-religious entities is a "distinction . . . between religious and secular associations [ ] based purely upon religion" is a mystery. (Assyrian Br. at 67.)

Amici also complain that Petitioners' position favors the party who holds record title. (Assyrian Br. at 66-67.) That is exactly what California law provides for *all* persons, religious or secular. (Evid. Code § 662.) But favoring the holders of record title is not an equal protection violation. A religious denomination is and should be on the *same* footing as any other legal person in California, and should be required to prove an ownership right by religion-neutral evidence before taking the property of a record titleholder.

D. The Deference or "Principle of Government" Approach Is Rife With the Potential For Abuse and the Establishment of Existing Hierarchical Religions, While Neutral Legal Principles Produce More Certain Results.

Amici extol the deference or "principle of government" rule by claiming that it possesses a "superior ability . . . to foster certainty and reduce the incidence of legal disputes." (Clerk Br. at 2.) Such purported "certainty" comes at great expense, as the "principle of government" approach does so by requiring secular courts to abdicate their decision-making role and instead rubber-stamp whatever outcome the denomination demands. Amici do not describe any viable framework under which a court could permissibly reject a denomination's governmental decrees, even if they were *ultra vires* or palpably incorrect. They, thus, put civil courts in the position of automatically and coercively enforcing the dictates of denominations, thereby establishing them as government-approved in the face of dissenters – a result that is undeniably unconstitutional.

Equally bad, the "principle of government" rule asks civil courts to defer to the denomination's *description* of its own "government." As described in the amicus curiae briefs filed by the Presbyterian Lay Committee and Iglesia Evangelica Latina, Inc., denominations often recharacterize themselves in court as "hierarchical" to effectuate a local property grab, when in fact for years they have assured their affiliated local churches that no hierarchy or overarching government exists. (*See* PLC Br. at 6-7, 25-26, 45-50; IEL Br. at 15.) Under the "principle of government" rule, this slei ght-of-hand is beyond the reach of civil courts to question. (*See* Louis A. Sirico, *Church Property Disputes: Churches As Secular and Alien Institutions*, 55 Fordham L. Rev. 335, 349 (1986) ["Even if the local church believed that the denomination had exceeded its jurisdiction or acted

arbitrarily, it could not make this argument successfully before a court. The denomination would respond that, according to the Supreme Court, these claims require an unconstitutional examination of church polity."].)

The result, in the words of Justice Rehnquist is that "[i]f the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness." (*Serbian Eastern Orthodox Diocese v. Milivojevich*, (1976) 426 U.S. 696, 727 [Rehnquist, J., dissenting].) This Court should be equally suspicious, particularly in light of California's diverse religious landscape and traditional respect for personal and minority rights.

And, in fact, there is no less certainty, indeed greater certainty, in applying neutral principles of law. Deeds, articles of incorporation, and statutory provisions are objectively verifiable, written documents. Although issues of interpretation sometimes arise, the scope of dispute is limited. The existing legal rules provide a great deal of certainty in deciding not only church property disputes, but much more numerous secular property disputes. They are constantly honed to create as much certainty as possible. By contrast, the deference or "principle of government" approach *starts* with an uncertain proposition: "What is the highest ecclesiastic authority for this particular religion and what is the religion's governance structure?" As this case illustrates, that is not an easy question. Here, is the highest authority the Episcopal Church or the Anglican Communion? To what degree is the denomination hierarchical?

A deference or "principle of government" approach does not foster certainty; it fosters establishment of certain religions as governmentally favored – and that is not constitutionally permitted.

E. *Jones* Did Not Recognize a Novel Denominational Right to Unilaterally Create an "Express Constitutional Trust" Without Regard to the Assent of the Burdened Local Church.

Amici erroneously parse one paragraph from *Jones v. Wolf* and conclude that "the U.S. Supreme Court directly instructed hierarchical churches . . . that to ensure that church property would be retained by its loyal members in the event of a dispute, they could amend their constitutions rather than amending individual deeds and corporate charters." (Clerk Br. at 15; Assyrian Br. at 63.) To the contrary, as explained in Petitioners' main briefing, this paragraph in *Jones* is permeated with two key concepts: (1) to be enforceable, any trust provision must be the product of mutual agreement between the *parties*; and (2) it is left up to the States to determine what trust provisions are "legally cognizable" *under state law*. (*Jones*, 443 U.S. at 606 [emphasis added]; Pet. Rep. Br. at 4-5.)

Nothing in *Jones* "instructed" denominations that they could unilaterally "ensure" a forfeiture of local church property upon withdrawal. Rather, this paragraph is full of references to *mutual consent* by the "parties" if "they so desire." (*Id.*) State courts must ultimately decide whether the "parties" have done so in "legally cognizable" form. *Jones* repeatedly recognized that the law governing property rights (e.g., the law of trusts) is a matter of *state* law. (*See Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 78 [property and trust law are matters for state decision; there is no "federal common law" governing property disputes].) Thus, *Jones* did not and could not have usurped this Court's right to determine whether unilateral denominational trust rules are "legally cognizable" in California.

Amici set up a straw man by arguing that, "[i]f the U.S. Supreme Court intended to limit the effectiveness of trust language to individual deeds and charters . . . it would have said so." (Clerk Br. at 17.) Petitioners do not argue that *only* deeds and articles of incorporation can be relevant under a state's law (*see* Assyrian Br. at 8), although under California law those are primary considerations. But Petitioners do assert – consistent with *Jones*' repeated reference to the *parties* taking steps to decide on any disposition of church property – that provisions in a denomination's constitution can only create a trust in local church property by *mutual* agreement or as otherwise allowed by state law; in California that means only to the extent that the *local church as owner expressly agrees to those provisions. Jones* cannot be fairly read to preempt state trust law and create a new species of federal constitutional trust in which the beneficiary alone has the power to create a trust in its own favor.

III. NEUTRAL PRINCIPLES PROVIDE A BETTER APPROACH FOR DETERMINING CHURCH PROPERTY DISPUTES.

Amici refuse to acknowledge the United States Supreme Court's expressed preference for the neutral principles approach. (Clerk Br. at 7.) That the Supreme Court did not expressly consign "deference" to the judicial dustbin does not mean that it did not recognize and commend neutral principles as the better, modern approach. *Jones* detailed "[t]he *primary advantages* of the neutral-principles approach . . . ." (*Jones*, 443 U.S. at 603 [emphasis added]; *see* Pet. Op. Br. at 30-39.) "On balance . . . the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application." (*Id.* at 604.) The U.S. Supreme Court offered no such praise for deferring to a denomination's "government," but rather

recognized that such an approach would often tend to lead courts into unconstitutional areas. (*Id.* at 605 [quoted in Section II(B), *supra*].)

Instead, the U.S. Supreme Court favorably recognized "[t]he neutral-principles approach [as], in contrast, obviat[ing] entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." (*Id.*) It is true that *Jones* did not rule the deference approach unconstitutional, but that issue was not before the Supreme Court in *Jones*. The Court did not have to reach and did not reach the extent to which a deference approach remains viable, because Georgia had not purported to apply a deference approach. What the Court did do was make clear that the "neutral principles of law" method has great advantages that avoid the difficulties inherent in other approaches.

As described in the main briefing, *Jones*' laud for "neutral principles of law" has been joined by numerous other state supreme courts and near unanimous academic opinion.[5] (*See* Jeffrey B. Hassler, *A Multitude of Sins: Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 Pepp. L. Rev. 399, 457 (2008); Pet. Op. Br. at 31-35; Pet. Rep. Br. at 8.) This trifecta of support for the "neutral principles of law" method – the U.S. Supreme Court, the best decisions of sister states, and the consensus of academia – amply demonstrate that it is the preferred modern approach, rather than a rule of blind "deference."

In sum, applying religion-neutral legal principles is superior and more affirming of constitutional principles than a deference or "principle of government" approach.

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[5] Petitioners have not been able to locate a single post-*Jones* academic article that praises "deference" or "principle of government" as preferable to "neutral principles."

IV. NEUTRAL CALIFORNIA LEGAL PRINCIPLES DICTATE THAT THE PROPERTY IN DISPUTE HERE BELONGS TO THE LOCAL CHURCH CORPORATION IN WHOSE NAME TITLE IS HELD.

The Amici do not – cannot – dispute the fundamental neutral California property law principles that Petitioners advance: e.g., a deed creates a strong presumption of both legal and equitable ownership, a trust beneficial interest can only created by the legal owner, not by the beneficiary, and California religious corporations are legally separate entities with a life of their own which can and do own property in their own right, not just as conduits for some higher echelon religious entity. As discussed in the main briefing, the relevant neutral legal principles – deeds, articles of incorporation, mutually agreed upon "general church" constitutional provisions, and state statutes – all support St. James Church's ownership. (*See Jones*, 443 U.S. at 603; *Barker*, 115 Cal.App.3d at 621; Pet. Op. Br. at 39-42.) Amici do not demonstrate otherwise. Rather, they quibble that certain particulars of California law somehow override the broad precepts. None of their proffered dodges has merit.

A. There Is No Basis For Finding a "Multi-Settlor" Trust In Favor of the Denomination.

The Hanmi Amici argue that a purported "trust" was created over Petitioners' property in favor of the Episcopal Church, not by the Episcopal Church itself but by those who contributed funds to St. James Church. The Amici theorize that the thousands of unknown individuals who donated to the local church over many decades created a "multi-settlor trust" in favor

of the denomination at the expense of the local church. (Hanmi Br. at 35-36.)

No party in this litigation has made this argument. Instead, Respondents have always argued that they, through their "constitution and canons," created the trust over the property of St. James Church. (Diocesan Answer Brief at 15, 28-30, 46-49; Episcopal Answer Brief at 46-47.) Absent extraordinary circumstances, an amicus curiae must take the issues in the case as it finds them and may not raise new issues, particularly ones that may have a factual component. (*See, e.g.*, *California Ass'n for Safety Educ. v. Brown* (1994) 30 Cal.App.4th 1264, 1274-75; *Younger v. State of Cal.* (1982) 137 Cal.App.3d 806, 813-14; *see Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 709-13 [Bird, C.J., concurring; noting that consideration of new issues raised by amici curiae should be limited to exceedingly rare instances].)

In any event, such a hypothesized "multi-settlor trust" has no support in the record. There is no evidence in the record that any contributions were received with any promise or even expectation to keep them in trust for the *denomination's* benefit, not that of the local church. Mere speculation will not suffice, as "[a] trust is created only if the settlor properly manifests an intention to create a trust." (Prob. Code § 15201.) The settlors must clearly and unambiguously manifest an intent to create a trust, and "words of desire, hope or recommendation that a devisee use the property for the benefit of another do not create a trust. The direction must be imperative." (13 Witkin, Summary of Cal. Law (2005) Trusts, § 33.) Thus, anonymous donations in local collection plates do not add up to a "multi-settlor trust" in favor of the denomination.

Indeed, the contrary presumption is more likely true – local church members donate to maintain their *local* place of worship, to support their efforts in the ir *local* community, and to build and maintain their *local*

property. There simply is no support for the multi-settlor trust that the Hanmi Amici hypothesize.

B. California's Statutory Scheme Governing Religious Corporations Favors Majoritarian Democracy, Not Denominational Dictates, and Uniformly Supports St. James Church's Rights.

Amici next suggest that denominational fiat is how local church rights are determined under California law. That is completely wrong. Unlike the hypothetical situation posited by the U.S. Supreme Court in *Jones,* California law does *not* provide that the control of a nonprofit religious corporation turns on denominational "laws and regulations." (*Cf. Jones*, 443 U.S. at 607 [remanding to Georgia Supreme Court for determination whether Georgia follows such a rule]; *Jones v. Wolf* (1979) 244 Ga. 388, *cert. denied* (1980) 444 U.S. 1080 [rejecting a denominational "laws and regulations" approach to control as a matter of state law].)

1. The Board and Members, Not the Denomination, Govern a California Religious Corporation.

California has a comprehensive statutory regime governing religious corporations in largely the same manner as for-profit corporations.[6] (Corp. Code §§ 9110-9690.) General principles of majoritarian corporate democracy control the management of the corporation. (*Id.*, § 9211(a)(8).)

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[6] For example, religious corporations are to be governed by a board of directors. (Corp. Code § 9210.) The directors are to be elected by the voting members of the corporation if the bylaws so provide, much like for-profit corporate directors are elected by shareholders. (*Id.*, § 9220.) The voting members may remove any and all directors with or without cause at any time. (*Id.*, § 9222.)

Just like in any other corporation, any naysayers can either abide by the decision of the majority and remain in the corporation, or choose to affiliate elsewhere. Under California law, the power to decide the fate of the local religious corporation rests with its *corporate* board and its members, *not* the denomination.

Corporations Code section 9132 confirms that local church corporations are independent, with property rights beyond unilateral denominational reach. Section 9132 directs that a "head organization" (e.g., denomination) may not dissolve "subordinate [religious] corporations" by revoking their religious charter or obtain such subordinate corporations' property upon such a dissolution absent certain *express* provisions to that effect in the subordinate entity's articles of incorporation. Some form of this provision has been the law since before St. James Church was incorporated. (*See* Corp. Code § 9132 [enacted in 1978] superseding former Corp. Code § 9301 [enacted in 1947].) The import of section 9132 is clear: Absent an enforceable, express contrary articles of incorporation provision (not present here), California local church corporations are subject to *local*, not denominational, control and retain independent property rights free from denominational interference.

In a variant on this theme, the Assyrian Church argues that neutral legal principles require "find[ing] the center of control within a religious body." (Assyrian Br. at 20.) Not so. The center of control of a local religious corporation is defined by California law – and it is the members of the local church. The question is not the center of control of a religious body, but who *owns* the property and who *controls the corporation* based on legal rules that apply to religious and secular entities alike.

Finally, Amici suggest that without a deference or "principle of government" rule, there will be no way to "ensure" that local church property could ever stay with a minority of members loyal to the

denomination in the event of a local church's disaffiliation. While ignoring the various methods by which a denomination could have a legally cognizable interest in local church property, Amici fail to explain why courts should be concerned with "ensuring" that a minority of members in a nonprofit corporation obtain the corporation's property when the majority rules to move the corporation in another direction. Nor can they explain why courts must "ensure" that interests of particular religious institutions —hierarchical denominations – are to be protected at the expense of others who wish to worship in a different context.

2. No Corporate By-Law Here Gave the Episcopal Church Unfettered Control Over St. James Church.

The Assyrian Church next argues that St. James Church has overlooked Corporations Code section 9150. (Assyrian Br. at 8.) It has not. Section 9150 simply and uncontroversially directs that a religious corporation's "[b]ylaws, . . . [are] the code or codes of rules used, adopted, or recognized for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated" and that they "may be adopted, amended or repealed as provided in the articles or bylaws and absent any [such] provision, . . . may be adopted, amended or repealed by approval of the members [ ] or the board . . . ." (Corp. Code § 9210(a), (b).) From this truism, the Assyrian Church argues that St. James Church was irrevocably bound by the constitution and canons of the Diocese and Episcopal Church no matter how they might change in the future. The syllogism goes like this: The Episcopal canons and constitution were referenced in the articles of incorporation, therefore they are by-laws, as by-laws they bind the

corporation no matter how they might be amended or by whom. There are several problems with this argument.

First, section 9150 itself authorizes the board of directors of a religious corporation to amend its by-laws. (Corp. Code § 9150(b).) The board of St. James Church did so here, removing any reference to the Episcopal Church's canons or constitution. When it did so, any interests supposedly created under those Episcopal instruments were revoked and disappeared. (*California-Nevada*, 121 Cal.App.4th at 770-71.)

Second, section 9150, subdivision (b), limits the right to amend or modify by-laws to *the corporation's board or members*. To the extent that the 1949 Episcopal canons and constitution might have been deemed by the reference in the articles of incorporation to constitute corporate by-laws, an external entity – the Episcopal Church – had no right to amend them on behalf of the St. James Church corporation.

Third, under section 9132 as just discussed, the powers that the Assyrian Church claims were created by reference to the Episcopal Church canons – transfer of a property interest to the Episcopal Church upon disaffiliation – statutorily can *only* be created by *explicit* provision in the articles of incorporation, not by reference to some external set of rules that a third-party can unilaterally change at a future time. (Corp. Code § 9132.)

Fourth, while the original articles referenced the constitution and canons of the Diocese and Episcopal Church, they did so only "for the time being." (8 RA 1540.)[7] Nothing in the original articles stated that adherence to Episcopal canons was irrevocable, no matter how they might change. (*Id.*) St. James Church did not restrict its ability to amend its articles in any fashion. The Restatement Second of Trusts, section 330, regarding

[7] "RA" refers to "Respondents' Appendix."

expressly irrevocable trusts relied on by the Assyrian Church is therefore inapplicable. (Assyrian Br. at 60.)

Finally, the Assyrian Church urges that Corporations Code section 9142(c) – at complete odds with section 9132 – authorizes denominations, unilaterally and without consent, to enact internal rules settling a trust in their favor over the property of members. As Petitioners explained in the main briefing, section 9142 does no such thing. (Pet. Op. Br. at 43-47; Pet. Rep. Br. at 32-37.)

The bottom line is that California's relevant Corporations Code provisions establish local church corporations as independent entities which retain sovereign property rights free from unilateral denominational control, subject only to the express exception of section 9132 which is not present here.

C. The Legal Principles Applicable to Voluntary Associations Neither Apply Nor Allow the Usurpation of Vested Property Rights.

Amicus Assyrian Church asserts that common law voluntary association principles result in an incorporated local church's surrender or forfeiture of its vested property rights. They do not.

According to the Assyrian Church, if a record titleholder joins an organization and agrees to submit to its governing internal rules, the organization can by simple later-enacted rule self-create a beneficial interest in the member's otherwise legally separate property. Rather, under law, the property's titleholder is the only party that can alienate its property. Thus, even under voluntary association law, unless the local church *expressly and irrevocably agrees to a specific, existing denominational rule*

changing the ownership of its property, it remains the owner of both legal and beneficial title.

No doubt, religious organizations spring from the freedom of individuals to voluntarily associate based on shared religious beliefs. That does not mean, however, that when they chose to adopt legally cognizable corporate forms, those forms can be ignored or deemed illusory. (*Cf. Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church* (1952) 39 Cal.2d 121 [affiliated religious corporation could not receive *unincorporated* religious association's property rights without consent of association's members]; *The Most Worshipful Sons of Light Grand Lodge v. Sons of Light Lodge No. 9* (1953) 118 Cal.App.2d 78 [addressing rights of unincorporated fraternal association constituents].) The legal principles governing voluntary associations do not override the express statutory directives as to religious *corporate* governance.

Nor can a voluntary association take by fiat the property of its affiliated members merely by enacting a rule creating its own ownership interest. Undoubtedly, voluntary associations may enact rules for their internal governance and good order. But "*bylaws or rules cannot be enforced when they compel a citizen to lose his rights in accumulated assets* or to forego the exercise of other rights which are constitutionally inviolable." (6 Am. Jur. 2d, Associations and Clubs § 6. [emphasis added].) "The general rule that courts will not intervene in the internal affairs of a voluntary association or club is subject to exception where the private rights of members are involved, it being generally recognized that judicial aid may be sought in case of actual or threatened invasion of the property or pecuniary rights of members." (*Id.*, § 29.) Thus, "when there is an abuse of discretion, and a clear, unreasonable and arbitrary invasion of private rights," civil courts will not enforce voluntary association rules. (*Lawson v. Hewell* (1897) 118 Cal. 613, 620; *see Budwin v. Am.*

Psychological Ass'n (1994) 24 Cal.App.4th 875, 879 ["a court will prohibit a private, voluntary association from enforcing a rule which is contrary to established public policy"].)[8]

Indeed, voluntary associations are constrained in their ability to affect their members' property interests. In *Von Arx v. San Francisco Gruetli Verein* (1896) 113 Cal. 377, the court restored to membership an expelled member of a voluntary association because his expulsion was not conducted in accordance with the by-laws of the society – but heavy on the Court's mind was the fact that expulsion would deprive the member of insurance benefits provided by the association. (*Id.* at 379; *see generally Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1066 [common law right of fair procedure applies before being deprived of membership in

[8] The Assyrian Church in part recognizes this point. It *agrees* that a denomination cannot self-settle a trust in its favor over individual adherents' property. (Assyrian Br. at 39-40.) But it never explains *why* the passage of an internal denominational rule affecting individual members' property would be "unconscionable" as exceeding "the mutually-expected nature and purpose of the association" but the same rule as to an incorporated subordinate entity would not. (Assyrian Br. at 39.) All of the elements of the purported "bargain" between local church and denomination listed at page 41 of the Assyrian Brief are present between the individual communicant and his denomination. An individual adherent's and an incorporated local church's rights are thus indistinguishable in this regard.

group where individual's substantial economic interests involved].)[9] To the extent that courts might not be able to properly inquire into the process by which denominations *purport* to affect adherents' vested property rights, the solution is not to afford religions confiscatory rights that are not given to other voluntary associations.

The voluntary association cases cited by the Assyrian Church are distinguishable, as they all involve disciplinary measures against members or other membership issues. (*California Dental Ass'n v. American Dental Ass'n* (1979) 23 Cal.3d 346, 349 [dealing with expulsion of member from membership, and his ensuing appeal within organization]; *Dingwall v. Amalgamated Ass'n* (1906) 4 Cal.App. 565, 567 [dealing with a trade association's wrongful expulsion of a member].) None suggests that a voluntary association can unilaterally create a beneficial interest in property owned by a member.

The fraternal association cases also fail to support the proposition that internal rules can be used to impose legally enforceable burdens on a *member's* property. (*Grand Grove of United Ancient Order of Druids v.*

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[9] *See also Greenwood v. Building Trades Council* (1925) 71 Cal.App. 159, 171 ["court(s) will, where property rights are involved, restrain the violation of the rules governing voluntary associations, at the behest of anyone who has suffered injury by such violations"]; *Ellis v. American Fed'n of Labor* (1941) 48 Cal.App.2d 440, 445 ["property rights" will "justify the interposition of the courts"]; *Lawson*, 118 Cal. at 621 ["The plaintiff does not show that any right of property belonging to him will be affected by the proposed action of the chapter."]; *Power v. Sheriffs' Relief Ass'n* (1943) 57 Cal.App.2d 350, 352 [amendment to mutual benefit association changing amount of benefit payments to members must be reasonable and related to the financial position of the organization]; *Simpson v. Salvation Army* (1942) 49 Cal.App.2d 371, 375 ["Where the organization has violated its own laws and regulations and has arbitrarily violated a member's property rights, such as the right to sick benefits, the member need not exhaust his remedies within the organization before resort is had to the courts."].

Garibaldi Grove No. 71 (1900) 130 Cal. 116, 118 [dealing with revocation by head organization of charter of subordinate *unincorporated* association]; *Gear v. Webster* (1968) 258 Cal.App.2d 57, 59 [confronting agreement to arbitrate disputes within realtors' association].) None of these cases addressed or approved a voluntary association's passage of a rule purporting to take or create a beneficial interest in the property of affiliates or members.

Significantly, the Assyrian Church has not cited a single case in which a voluntary association was permitted to enact a rule creating an ownership interest for itself in the property of its members, especially separately incorporated members. Voluntary associations simply do not have the power to make internal rules to take the property of members, or to require members to forfeit their property upon withdrawal from the association.

In sum, no principle of the law governing voluntary associations suggests that by being affiliated with the Episcopal Church, the separately incorporated St. James Church surrendered its property rights or granted to the Episcopal Church the right to unilaterally appropriate its property.

D. St. James Never Contractually Agreed to Any "Trust Canon" or Conveyed Any Other Property Right to the Episcopal Church.

The Assyrian Church also urges that St. James Church somehow contractually agreed to forfeit its property to the Episcopal Church upon its change of affiliation. It did not.

Viewing the relationship between St. James Church and the Episcopal Church as a contractual one, the Assyrian Church urges that the Episcopal Church's self-generated "trust rule" contractually binds St. James

Church. (Assyrian Br. at 30-34.) The Assyrian Church posits that St. James Church's articles of incorporation gave the Episcopal Church a contract right to assert whatever rights it might desire over local church property at some future time.

Of course, contractual obligations require a "meeting of the minds" and mutual consent as to known terms. There can be no meeting of the minds on terms that both did not exist and were not contemplated at the time of any supposed contract. (Civ. Code § 1636 [contract meaning determined by the "mutual intention of the parties *as it existed at the time of contracting*"; emphasis added].) No "trust canon" or anything like it existed when St. James Church was incorporated and St. James Church never agreed to any supposed "trust canon" thereafter.

The Presbyterian Leadership Amici thus suggest that denominational "trust rules" are enacted with the knowledge and consent of local churches. (Clerk Br. at 18, n.6.) That is not the case. Merely because a denomination's "general convention" may have delegates from various sub-units such as dioceses or presbyteries does not mean that each *local church* can send or has sent delegates. Likewise, a majority of delegates has no right to deprive a dissenting local church of its property rights without the express consent of its corporate members. (Corp. Code § 9631(a)(2).) Certainly, there is no evidence in this record that St. James Church had a representative at the Episcopal conclave or that any authorized person of St. James Church corporation ever agreed to the "trust canon" on its behalf.

The Assyrian Church argues, nonetheless, that the necessary mutual agreement may be found in St. James Church's original 1949 articles of incorporation. In particular, it points to the provision that St. James Church would be "bound by" the then-existing "Constitution and Canons, Rules, Regulations and Discipline of [the Episcopal Church]." (8 RA 1540). In 1949, the constitution and canons of both the Diocese and Episcopal

Church contained no provisions affecting the ownership of local church property or claiming any ownership interest therein. (8 RA 1547-1696; *Barker*, 115 Cal.App.3d at 624.) They did restrict how local churches could *use* their property *while Episcopalian*, including restrictions on mortgaging or encumbering "consecrated" property. (8 AA 1620 [Canon 25, § 2].) But the only penalty for violating such provisions appears to have been expulsion of the local church from the Diocese. (8 AA 1553-54 [Art. XIX, § 41].). Nowhere in the canons as they then existed did the denomination have the ability to confiscate or to obtain an interest – legal or beneficial – in the property of withdrawing or errant churches. Indeed, the Episcopal Church's canon governing the establishment of parishes states that it "shall not affect the legal rights of property of any Parish or Congregation." (8 RA 1611-12 [Canon 12, § 3(c).)

Yet, from these limited provisions, the Assyrian Church speculates that St. James Church "understood" that it had surrendered any and all foreseeable rights to the Episcopal Church's whim. That is simply not a plausible reading. *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, is directly on point. There, a bank sought to add an alternative dispute resolution clause to its account agreements with customers, relying on a change-of-terms provision in the original account agreements. On appeal, the bank – like the Assyrian Church here – argued that "by entering the original account agreements, the customers agreed ahead of time to be bound by any term the Bank might choose to impose in the future." (*Id.* at 791.) *Badie* rejected the argument: "The contract modification cases . . . do not support the proposition that a party with the unilateral right to modify a contract has carte blanche to make any kind of change whatsoever as long as a specified procedure is followed." (*Badie*, 67 Cal.App.4th at 791.) Instead, the court held that the only acceptable modifications are

those "*whose general subject matter was anticipated when the contract was entered into.*" (*Id.* [emphasis added].)

A party may not " reserve[ ] to itself the unilateral and nonnegotiable right to vary every aspect of the performance required by the parties . . . with no limitation on the substantive nature of the changes it may make as long as it complies with the de minimis procedural requirement of 'notice' . . . ." (*Id.* at 796.) Allowing a party "to exercise its unilateral rights under the change of terms provision, without any limitation on the substantive nature of the change permitted, would open the door to a claim that the agreements are illusory." (*Id.* at 797.)

St. James Church cannot be deemed to have incipiently agreed, or even to have been on notice, that the denomination could enact a "trust rule" decades later that might purport to unilaterally transfer property rights. Nothing in the articles of incorporation or the then-existing Episcopal governing documents suggested that the Episcopal Church had or could claim ownership rights in the local church's property. St. James Church's agreement to be bound by denominational rules when it applied to be recognized as a "parish" of the Episcopal Diocese of Los Angeles are comparable to those of any other person joining an association with internal rules, be it a mutual aid society (*Sheriff's Relief Ass'n*), a trade association (*Building Trades Council*), or a credit union or bank (*Badie*). They are not an open-ended agreement to any future property grab that the denomination might sneak into its canons or by-laws. That was the conclusion, on nearly identical facts, in *Barker*. (*Barker*, 115 Cal.App.3d at 624 ["At the times the three earlier churches were incorporated and acquired their property [1907, 1931 and 1944], nothing in the general church constitution, canons, and rules operated to create an express trust in local church property in favor of the general church."].) It is reinforced by the fact that St. James

Church's agreement, expressly, was only "for the time being," and thus revocable. (8 RA 1540.)[10]

Nothing in St. James Church's articles of incorporation created or even contemplated a contractual right given to the Episcopal Church to, at some later time, unilaterally self-settle whatever property rights it wished in the local church's property.

V. AMICI'S END RUN AROUND NEUTRAL CALIFORNIA LEGAL PRINCIPLES THROUGH A SO-CALLED "TRUE CHURCH" DETERMINATION IS NOT SUPPORTED BY THE LAW OR THE FACTS OF THIS CASE.

Finally, Amici contend that they can disregard the usual laws of property ownership and trust, and instead self-determine the "true church" entitled to "use" or "control" the property of St. James Church corporation. (Hanmi Br. at 8-21.) Amici assert that ownership of local church property is essentially irrelevant, because a hierarchical denomination possesses some superseding power to issue binding "church rulings as to the *management* of church property" regardless of who owns it. (Hanmi Br. at 8 [emphasis added].) Thus, according to Amici, denominations may use

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[10] To the extent that St. James Church promised to be "forever held under . . . the Ecclesiastical Authority of the Bishop of Los Angeles and his successors in office," and clergy serving at the local church promised to "conform to the Doctrine, Discipline and Worship of the Episcopal Church," those promises were spiritual in nature. (6 AA 1125-26 [Diocese's Appellants' Appendix].) No enforceable secular legal right can be gleaned out of them as civil courts cannot construe them without construing the inherently religious terms "Ecclesiastical Authority" and "Doctrine, Discipline and Worship." This type of "searching . . . inquiry" by civil courts is constitutionally "impermissible." (*Serbian Eastern Orthodox Church v. Milivojevich* (1976) 426 U.S. 696, 723.)

their spiritual powers to decide who gets to *use* property of even those local churches that have left the denomination. Nothing in the law or the facts of this case suggests such a nonsensical conclusion, for at least four key reasons.

A. A Self-Proclaimed Denominational Right to Control Local Church Property Does Not End the Inquiry.

First, absent clear and convincing contrary evidence, in California, the legal owner of the property has full *beneficial* interest in the property. (Evid. Code § 662.) A self-asserted claim to the right to manage or control property begs the question of "who owns the property?" In this case, there is no dispute that St. James Church corporation owns clear title to all parcels of its property, and therefore it is entitled to a statutory presumption of control and management over that property.

B. St. James Church Ended Any Controversy About Which "Episcopal" Group Was Entitled to Use Its Property When It Ended Its Affiliation With the Episcopal Denomination.

Once St. James Church corporation ended its denominational affiliation, the denomination retained no power to make a "true church determination" or to apportion property between it and some new group the denomination might recognize. A local church that has withdrawn from the denomination entirely is no longer part of the denomination's "internal" affairs that it could ever "determine." Here, there are *not* two groups in Newport Beach both claiming to be "Episcopal." Thus, who is the Episcopal Church's "true church" in Newport Beach is not at issue here. St. James Church is no longer Episcopal, and does not wish to be. (4 AA

723-725.) Who owns property, the deed to which the separately incorporated St. James Church holds, is the question.

Presbytery of Riverside v. Community Church of Palm Springs (1979) 89 Cal.App.3d 910, makes this very point. There, a local church withdrew from the Presbyterian denomination, which then purported to suspend the powers of the seceders and decree that an "Administrative Commission" was the "true church" entitled to control the property. "However, this reasoning disregards a number of essential facts. When Presbytery acted . . . to suspend the powers of the Community Church session . . . Community Church had already terminated its relationship with UPCUSA and withdrawn from the Presbyterian denomination. [. . .] There is no question in this case as to which body is the true Presbyterian church in Palm Springs. Community Church has renounced its affiliation with the Presbyterian denomination and does not claim to be a Presbyterian church or the representative of UPCUSA in Palm Springs." (*Id.* at 924.) Because the local church had severed its ties with the denomination, "[i]n truth, there is no existing religious or ecclesiastical controversy . . . *Community Church ended that controversy when it withdrew from UPCUSA and terminated its relationship with the Presbyterian denomination.*" (*Id.* [emphasis added].)

The rationale of *Presbytery of Riverside* is sound. If a denomination retains the power to affect the control of a separate local church corporation even after it ends its denominational affiliation, then the local church corporation is a charade and no change of affiliation would ever be possible. The denomination could simply order control (and property) vested in those few local church members who remained loyal to it, no matter the outcome of any corporate vote. Such a result would contradict California corporate law, and restrict the freedom of the majority to determine corporate fate.

C. Nothing In *Jones* Requires Civil Courts to Enforce Denominational "Determinations" Regarding Who Can "Use" Local Church Property.

Misconstruing *Jones*, Amici assert that California courts are constitutionally bound to enforce the Episcopal Church's "determinations" regarding the ownership and use of the St. James property. (Hanmi Br. at 17.) They expend pages arguing the inherently unobjectionable assertion that civil courts are required to defer to a church's internal policy decisions regarding doctrine, discipline and polity. (Hanmi Br. at 9-12.) But they fail to recognize that such deference is limited to *internal* affairs and does *not* extend to property disputes with former adherents. (*See Jones*, 443 U.S. at 602 [limiting deference to matters of "religious doctrine or policy"].)

In reality, the denomination is demanding not deference, but special affirmative judicial treatment, namely that the State use its coercive power to implement its assertion of private property rights. Civil courts are not the handmaids of religious denominations and do not "interfere" by refusing to be such. Denominations remain free to "manage their internal affairs free of government interference." (Hanmi Br. at 17.) But ownership of property held in the name of another legally separate entity is not an internal affair, it is a question of civil property law.

Jones does not, as Amici argue, stand for the proposition that a church's tribunals have the exclusive province to determine the property rights of those who have left the denomination. When read in totality, rather than the selective language cited by Amici (Hanmi Br. at 11), *Jones* stands for the precise opposite. *Jones* held that treating a local church corporation as governed by a majority of its members (as California law does for incorporated local churches) is perfectly acceptable. "If in fact

Georgia has adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, we think this would be consistent with both the neutral-principles analysis and the First Amendment. Majority rule is generally employed in the governance of religious societies." (*Jones*, 443 U.S. at 607.) The Supreme Court remanded *Jones* because it was not clear that the state law before it – that of Georgia – followed such a majoritarian approach or rather evaluated the identity of the local church based on the denomination's "laws and regulations." *Jones* did not hold that a determination of who is the real owner of property is always left to the denomination and regardless of the circumstances.[11]

Read fully, *Jones* does *not* hold that a state court must defer to "the Presbytery's exclusive authority to determine the 'true church' faction . . . entitled to the exclusive authority to manage the subject property," as Amici claim. (Hanmi Br. at 10.) Rather, that could be true only if *state law* defines the identity of the local church solely as determined by the denomination, and even then that state law may not be dispositive. As discussed above, there is no such state law in California.

D. The California Decisions Cited By Amici in Support of Their "True Church Determination" Argument Are Distinguishable.

The Court of Appeal decisions cited by Amici for the proposition that neutral California legal principles defer to denominational

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[11] On remand, the Georgia Supreme Court clarified that in Georgia, majority rule determines who controls a local church and its property, subject to the factors specified in *Jones* – deeds, state statutes, local church charters, and mutually agreed upon denominational documents. (*Jones v. Wolf* (1979) 244 Ga. 388, *cert. denied* (1980) 444 U.S. 1080.)

determinations regarding who controls local church property are easily distinguishable on their facts. (Assyrian Br. at 12-16.) Although certain appellate decisions might be misread as unduly favoring denominations, in fact, those decisions are rooted in neutral legal principles as applied to their peculiar facts.

For example, in *Korean United Presbyterian Church v. Presbytery of the Pacific* (1991) 230 Cal.App.3d 480, *disapproved on other grounds in Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, Justice Fred Woods, speaking for the court, purported to apply neutral legal principles to a church property dispute ensuing after a local church's denominational withdrawal. (*Id.* at 496.) *Korean United* held that the trial court erred "by substituting the court's judgment for the judgment of Presbytery regarding the identity of the particular church entitled to use and enjoy the Church property, a question of church doctrine and polity." (*Id.* at 500.)

The facts, there, however, were very different from those here. First, legal title to the property at issue was held in the denomination's (the presbytery's) name. (*Id.* at 491-92.) Second, the supposedly seceding local church did not attempt to hold congregational votes and amend its governing documents to reflect disaffiliation until long after the denomination had removed and replaced its leadership and recognized a different group as the true Presbyterian members. (*Id.* at 505-06.) Thus, *Korean United* is a very different case distinguishable on its facts. In any event, to the extent that *Korean United* suggests that some religion-neutral legal principle allows a denomination or an equivalent secular hierarchical organization to unilaterally control another local religious corporation, it is incorrect for all of the above reasons and those in the main briefing.

Other recent cases favoring denominations are likewise distinguishable on their facts. *Metropolitan Philip v. Steiger* (2000) 82 Cal.App.4th 923, deferred to the denomination regarding who should

control the local church corporation. But there the local church never formally left the denomination; rather, it voted to "seek permission from [its ruling archbishop] to leave Antioch." (*Id.* at 927-28.) That permission was denied, and the archbishop responded harshly, defrocking most of the priests at the local church and granting control of the church to those who had not sought permission to leave. (*Id.* at 928-29.) The Court of Appeal's refusal to interfere was consistent with neutral principles of California law. There was no evidence that the local church ever *withdrew* from the Antiochian Orthodox Church through proper corporate processes. To the contrary, the parties in that case acknowledged the denomination's power over them; the respondents pursued internal remedies up to the Court of the Patriarch in Damascus, Syria, before coming to the civil courts. (*Id.* at 928.) There was no reason for civil courts to second-guess the "Spiritual Court" of the denomination, to which the parties voluntarily submitted their dispute. Again, here, St. James Church *left* the Episcopal Church and has never agreed to its continuing jurisdiction.

Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal.App.4th 1396, also used neutral legal principles to assess the corporate validity of a local church's attempted withdrawal vote. (*Id.* at 1415.) Only after satisfying itself that this vote was invalid did the court accept the denomination's imposition of "regional supervision," which had the effect of controlling the local church corporation. (*Id.* at 1416.) The court noted that it so found "independent of the impact on this decision of the ecclesiastical rule of judicial deference." (*Id.*)

Thus, in fact, no neutral legal principle supports allowing a denomination to circumvent the issue of property ownership entirely by purporting to declare who are the "true members" of a local church corporation which has already severed ties with that denomination.

VI. AMICI'S RECORD-SPECIFIC CLAIMS ARE ILL-FOUNDED.

The Hanmi Amici argue that the parties misunderstand the facts and posture of their own case. (*See* Hanmi Br., at 5-8.) They are mistaken.

First, the appeal by the Diocese of Los Angeles is from the grant of a special motion to strike under California Code of Civil Procedure section 425.16 (the anti-SLAPP statute). The Diocese was required to make a supportive *factual* showing. It did not. The Hanmi Brief's many "factual" statements supported only by citations to the unsubstantiated *allegations* of the Complaint, therefore, are beside the point. (Hanmi Br. at 6.)

Second, Amici's second-hand retelling of the events at St. James Church is highly inaccurate and not grounded in any evidence. The local church here was not "torn apart" by some "schism." (*Cf.* Hanmi Br. at 6.) Rather, over 97% of the voting members of the local church corporation voted to change its affiliation from one branch of the Anglican Church to another. (4 AA 723-25.) Far from attempting to "reconcile" anything, the Respondents' response was to immediately threaten and initiate litigation. (1 AA 1.) The claim that there were "factions" at St. James Church is likewise unsupported by the record. Since the Diocese of Los Angeles and the Episcopal Church could find only one disgruntled member to join their lawsuit, the record shows that any "factions" consist of hundreds of voting members, on one hand, and a single member, on the other.

Third, the claim that the trial court "ignored" the request for a declaratory judgment is also incorrect. (Hanmi Br. at 7.) By finding that Respondents did not enjoy a probability of success on the merits of their claims (including their claim for a declaration of rights in their favor), the superior court implicitly found that Respondents' purported "true church" determination could not affect the management and control of a California

nonprofit religious corporation. Further, St. James does not pretend to be a "true church" affiliated with the Episcopal Church. Rather, St. James made a clean break from the Episcopal Church before any property dispute erupted.

Amicus Assyrian Church likewise misstates the record on appeal below. First, Petitioner St. James Church received a parcel of property which had *already* been donated by a community business for its use. (4 AA 721; 8 RA 1706, 1708.) Because St. James Church was not incorporated at the time of the gift, the donor donated the property through the Diocese of Los Angeles *for* the local church; once St. James Church incorporated, the Diocese deeded it the property. (8 RA 1706-08.) The local church, *not the denomination,* was always the intended beneficiary of the gift. Thus, the Assyrian Church's suggestion that the Diocese "gave" something to the local church is incorrect. (Assyrian Br. at 1.) The Diocese received the property initially in trust for the soon to be incorporated local church and fulfilled its role of passing that property on to its intended recipient.

Second, when St. James Church joined the Episcopal Church and the Diocese, their "constitution and canons" contained *no* provisions addressing the *ownership* of local church property. (*See supra* at 32; *Cf.* Assyrian Br. at 1.) While there were some provisions prescribing how local churches could use their property while Episcopalian, it was not until 1979 that the Episcopal Church made any claim to have an ownership interest in local church property. (Diocesan Answer Br. at 15.)

Third, from 1949 onward, St. James Church was an autonomous, self-governing parish corporation. For fifty-five years, St. James held unblemished, unqualified record title to all of its real property, three additional parcels of which it purchased post-affiliation with its own funds. (4 AA 721-22; 8 RA 1710-21.) There is no evidence in the record that the

Diocese or the Episcopal Church controlled or possessed "senior governance authority" over that property. (Hanmi Br. at 5.) Rather, the relationship was characterized by St. James Church's independent property ownership and sending millions of dollars in donations to the Diocese and through it, the Episcopal Church. (Pet. Op. Br. at 9.)

Accordingly, to the extent Amici make an argument that the equities somehow favor the Respondents in this case, or that St. James Church always understood itself to have forfeited its property rights and corporate independence to the Episcopal Church, such arguments are based on speculation, misstatements and misunderstandings of the record. They should be disregarded.

CONCLUSION

The briefs filed by Amici add little to the main briefing. They fail to honestly confront, much less ameliorate, the serious shortcomings inherent in a "principle of government" or "deference to hierarchy" rule. Rather, at base, they argue for an abdication of civil judicial power to determine property ownership to the leaders of certain hierarchical denominations. In effect, they urge establishing those religious structures as governmentally preferred over dissenting or disaffiliating local churches and over other types of religions.

For these and all of the above reasons, pure neutral principles of law should be adopted by this Court as the rule of decision for church property disputes in California. Under unimpeachable, longstanding neutral California legal principles, the property in dispute here belongs to the local church.

The Court of Appeal's judgment should be reversed and the trial court's judgment should be reinstated.

DATED: August 5, 2008

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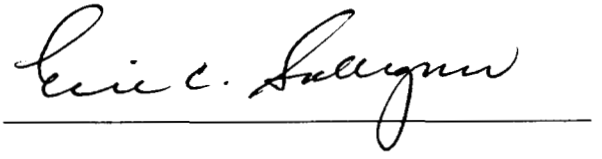
By: 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c)(1))

The text of this Petitioners' Consolidated Response consists of 12,307 words as counted by the Microsoft word processing program used to generate the Brief.

DATED: August 5, 2008

Daniel F. Lula

4853-1012-6850.5

PROOF OF SERVICE

Episcopal Church Cases
Appeal No. S155094

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action; my business address is Jamboree Center, 4 Park Plaza, Suite 1100, Irvine, California 92614.

I am employed by Payne & Fears LLP. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service and common carriers promising overnight delivery. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service or the common carrier on the same day I submit it for collection and processing.

On August 5, 2008, I served the following document(s) described as **PETITIONERS' CONSOLIDATED RESPONSE TO AMICUS CURIAE BRIEFS FILED BY CLIFTON KIRKPATRICK, ET AL., PRESBYTERY OF HANMI, ET AL., AND THE HOLY APOSTOLIC CATHOLIC ASSYRIAN CHURCH OF THE EAST IN SUPPORT OF RESPONDENTS** on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes, addressed as follows:

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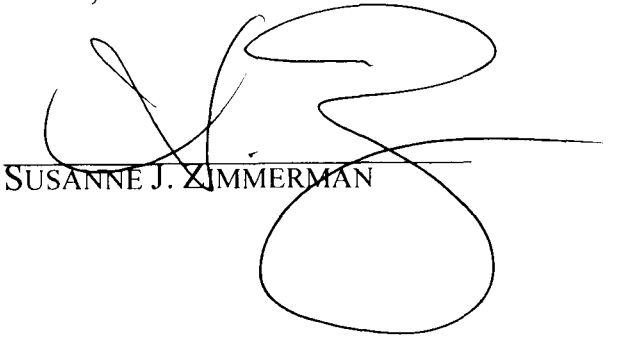
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 5, 2008, at Irvine, California.



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Episcopal Church Cases
Appeal No. S155094

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